

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
CENTRAL PUGET SOUND REGION  
STATE OF WASHINGTON

WILLIAM J. REHBERG, JAMES L. HALMO,  
AND MARILYN K. SANDERS

Petitioners,

v.

PIERCE COUNTY,

Respondent.

**Case No. 13-3-0010**

**ORDER FINDING COMPLIANCE  
[Re: Pierce County Ordinance No.  
2013-30s2]**

**SYNOPSIS**

Pierce County adopted Ordinance No. 2013-30s2 recodifying and consolidating various development regulations. Petitioners challenged numerous provisions. In the Final Decision and Order, the Board found many of Petitioners' issues were time-barred, as the regulations had merely been recodified without amendment. The Board remanded elements of the signage regulation to ensure protection of rural character consistent with the Pierce County Comprehensive Plan, as required by RCW 36.70A.030(1)(d).

On compliance, the County adopted Ordinance No. 2014-42 prohibiting electronic signs in rural zones outside community plan areas, with limited exceptions for some public facilities, churches, and temporary traffic signs. The Board enters a Finding of Compliance and the case is closed.

**I. PROCEDURAL BACKGROUND**

On remand to ensure its signage regulations protect rural character as required by its Comprehensive Plan and the GMA, Pierce County adopted Ordinance No. 2014-42 (the Compliance Ordinance) on May 20, 2014, with an effective date of June 1, 2014. The County's Statement of Actions Taken to Comply (SATC) was received on May 23, 2014.

1 The County provided a copy of Ordinance No. 2014-42, of which the Board takes official  
2 notice pursuant to WAC 242-03-630(4). Petitioners filed a Response to Respondent's  
3 SATC on June 16, 2014, objecting to several changes made in the Compliance Ordinance.  
4 Respondent's Response to Objections was received June 17, 2014. Because of confusion  
5 caused by a scrivener's error in the Prehearing Order, the Board issued an Order Clarifying  
6 Compliance Issues on June 25, 2014.  
7

8 The Compliance Hearing was held telephonically on July 1, 2014, at 1:30 p.m.  
9 Present for the Board were Cheryl Pflug, Margaret Pageler, and Raymond Paolella.  
10 Petitioners James Halmo, William Rehberg, and Marilyn Sanders were present and  
11 represented by James Halmo. Pierce County appeared by its attorney, Pete Philley, who  
12 was accompanied by Todd Campbell. The hearing afforded each party the opportunity to  
13 emphasize the most cogent facts and arguments relevant to compliance. Board members  
14 asked questions seeking to thoroughly understand the history of the proceedings, the  
15 important facts in the case, and the legal arguments of the parties.  
16

## 17 **II. BURDEN OF PROOF**

18  
19 Following a finding of noncompliance, the jurisdiction is given a period of time to  
20 adopt legislation to achieve compliance.<sup>1</sup> After the period for compliance has expired, the  
21 Board is required to hold a hearing to determine whether the local jurisdiction has achieved  
22 compliance.<sup>2</sup> For purposes of Board review of the comprehensive plans and development  
23 regulations adopted by local governments in response to a noncompliance finding, the  
24 presumption of validity applies and the burden is on the challenger to establish the new  
25 adoption is clearly erroneous.<sup>3</sup> Here, the Board declined to impose invalidity. Petitioners  
26 bear the burden to establish the County's compliance action is clearly erroneous. In order  
27 to find the County's action clearly erroneous, the Board must be "left with the firm and  
28 definite conviction that a mistake has been made."<sup>4</sup>  
29  
30

31  
32 <sup>1</sup> RCW 36.70A.300(3)(b).

<sup>2</sup> RCW 36.70A.330(1) and (2).

<sup>3</sup> RCW 36.70A.320(1), (2), and (3).

<sup>4</sup> *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

1 Within the framework of state goals and requirements, the Board must grant  
2 deference to local governments in how they plan for growth.<sup>5</sup> However, the Board's role in  
3 compliance proceedings is not identical to that during initial consideration of a Petition for  
4 Review. When the Board has identified non-complying provisions of a local jurisdiction's  
5 plan or regulations, the jurisdiction is under an obligation to bring those provisions into  
6 compliance and the Board is required to make a determination as to compliance.<sup>6</sup>  
7 Consequently, the Board reviews all of the County's actions regarding the remanded issues,  
8 whether or not challenged by Petitioners.  
9

### 10 III. DISCUSSION

#### 11 The Remanded Issues

12 In its Final Decision and Order (FDO), the Board ruled that provisions of the  
13 challenged ordinance allowing electronic message boards in the non-community plan rural  
14 areas failed to comply with RCW 36.70A.130(1)(d) and **remanded the Ordinance to the**  
15 **County to bring its signage regulations for the non-community plan rural areas into**  
16 **compliance with the rural character provisions of its Comprehensive Plan as required**  
17 **by the GMA.**<sup>7</sup>  
18  
19  
20

21 <sup>5</sup> RCW 36.70A.3201, in part: "The legislature intends that the board applies a more deferential standard of  
22 review to actions of counties and cities than the preponderance of the evidence standard provided for under  
23 existing law. . . Local comprehensive plans and development regulations require counties and cities to balance  
24 priorities and options for action in full consideration of local circumstances."

25 <sup>6</sup> See RCW 36.70A.300(3)(b) and RCW 36.70A.330 as well as *Abenroth, et al. v. Skagit County* and *Skagit*  
26 *County Growthwatch, et al. v. Skagit County*. "RCW 36.70A.300(3)(b) is explicit. It requires Skagit County to  
27 comply with the GMA in areas where the Board's August 6, 2007, Order found noncompliance . . . The issue in  
28 compliance proceedings is somewhat different than it is during an original adoption. In compliance  
29 proceedings, the Board has identified an area of the local jurisdiction's comprehensive plan or development  
30 regulations that do not comply with the GMA. The local jurisdiction is under an obligation to bring those areas  
31 into compliance. . . While the ordinance that is adopted to cure non-compliance is entitled to a presumption of  
32 validity, nevertheless, the local jurisdiction must still demonstrate to the Board that it has addressed the area of  
noncompliance identified in the FDO. A mere lack of objection by the petitioner does not demonstrate that the  
non-compliant provision has been cured. . . **Even though Petitioners did not point out that the County**  
**had not taken action to comply pursuant to RCW 36.70A.300(3)(b), it does not relieve the County of its**  
**responsibility to comply with the requirements of the Growth Management Act or the Board of its**  
**responsibility to determine compliance pursuant to RCW 36.70A.330(1) and (2)." *Abenroth, et al. v.*  
*Skagit County*, Case No. 97-2-0060c, coordinated with *Skagit County Growthwatch, et al. v. Skagit County*,  
Case No. 07-2-0002, Order on Reconsideration (January 21, 2009) at 4-6 (emphasis added).**

<sup>7</sup> FDO (April 28, 2014) at 15-16.

1 **The County's Compliance Action**

2 On remand, the County adopted Pierce County Ordinance No. 2014-42 addressing  
3 signage regulations for the non-community plan rural areas by making the following  
4 amendments to the Pierce County Code:

- 5
- 6 • Chapter 18B.10.040 was amended to authorize temporary electronic signs only  
7 for traffic control purposes within County or State right of ways.<sup>8</sup>
  - 8 • Chapter 18B.10.070.A.2, Prohibited Sign Types, was amended to prohibit  
9 electronic signs in all rural zone classifications.<sup>9</sup>
  - 10 • Chapter 18B.20.080, Electronic Message Signs, was amended to explicitly delete  
11 the language that previously allowed electronic message signs "outside  
12 designated community plan areas." The effect of this amendment is to limit  
13 authorization of electronic messages signs to only **select uses** (schools, regional  
14 park facilities, police and fire stations, and religious facilities) **within urban zone**  
15 **classifications**, except the Gig Harbor Peninsula Community Plan Area where  
16 they are prohibited entirely.<sup>10</sup>
  - 17 • Chapter 18B.30.120, pertaining to the Upper Nisqually Valley Community Plan  
18 Area, was amended by deleting reference to electronic signs.<sup>11</sup>
  - 19 • Chapter 18B.70.010, Sign Definitions, was amended to remove the words  
20 "electronic, nonpictorial, text" from the definition of "electronic messages signs" so  
21 that any information shown on electronic messages signs is subject to regulation,  
22 not just text.<sup>12</sup>
- 23

24

25 With these amendments, the County prohibited all electronic signs in all rural zone  
26 classifications, with the exception of temporary electronic traffic control signs.<sup>13</sup>

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30 <sup>8</sup> Respondent's SATC at 3; Exhibit C to Ordinance No. 2014-42 at 1.

31 <sup>9</sup> *Id.*

32 <sup>10</sup> Respondent's SATC at 4; Exhibit C to Ordinance No. 2014-42 at 2.

<sup>11</sup> Respondent's SATC at 4-5; Exhibit C to Ordinance No. 2014-42 at 3.

<sup>12</sup> Respondent's SATC at 5; Exhibit C to Ordinance No. 2014-42 at 4.

<sup>13</sup> Respondent's SATC at 5.

1 **Petitioners' Objections**

2 ***Signage:***

3 With regard to electronic signage outside the community plan areas, Petitioners are  
4 satisfied with the County's actions on compliance. However, Petitioners object to the  
5 deletion of the prohibition against electronic signs in the Upper Nisqually Valley Community  
6 Plan area.<sup>14</sup>  
7

8 ***Clustering:***

9 Petitioners object to changes made in the Density and Dimension Tables<sup>15</sup> regarding  
10 Agricultural Resource Lands (ARL) and Rural Farm (RF).<sup>16</sup>  
11

12 **Board Discussion and Analysis**

13 ***Signage:***

14 Petitioners continue to object to the deletion of the prohibition against electronic signs  
15 in the Upper Nisqually Valley Community Plan area, arguing that the deletion of 18B.20.40F  
16 Application for Discretionary Land Use Review, which allowed PALS to prescribe more  
17 restrictions on area, heights, illumination, and setbacks of signage beyond those normally  
18 prescribed, prevents the County from ensuring the protection of rural character and rural  
19 development in violation of RCW 36.70A.070(5)<sup>17</sup> per Petitioners' complaint in Issue IVE.<sup>18</sup>  
20  
21

22 In its FDO, the Board found that the Ordinance made no changes to the Pierce  
23 County Comprehensive Plan or any of the sub-area Community Plans<sup>19</sup> and dismissed  
24

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26 <sup>14</sup> Petitioners' Response to Respondent's SATC at 1-2.

27 <sup>15</sup> Table 18A.15.020-2 in Ordinance No. 2014-42, Exhibit B at 2 and Exhibit D at 12; *Compare* Table  
28 18A.15.020-2 in Ordinance No. 2013-30s2, Exhibit D at 12, 35, 56 and Exhibit B at 5.

29 <sup>16</sup> Petitioners' Response to Respondent's SATC at 2-4.

30 <sup>17</sup> Petitioners' Response to Respondent's SATC at 1-2; Petitioners' Prehearing Brief at 34-35.

31 <sup>18</sup> Petitioners' Issue IVE alleged that Pierce County failed to comply with the State's Growth Management Act,  
32 RCW 36.70A.130(1)(d) and the County Comprehensive Plan 19A.30.200B, the County Development  
Regulations 18A.05.020B and 18A.05.030, the County Countywide Planning Policies Rur-1, 2, 3, Rur-7 and  
UGA-5 in adopting amendments in Pierce County Ordinance No. 2013-30s2 which lack consistency for land  
use planning, in deleting 18B.20.040F, which authorized restriction on land uses (signage). See Petition for  
Review: Restatement of Detailed Statement of the Issues (November 18, 2013) at 4.

19 Petitioners' response to Board Member Paoletta, Hearing on the Merits (March 26, 2014); Respondent's  
Prehearing Response Brief (February 26, 2014) at 2, 15.

1 Petitioners' challenge to Pierce County's Comprehensive Plan or Community Plans for  
2 noncompliance with RCW 36.70A.070(5).<sup>20</sup> Petitioners made no argument in their  
3 Prehearing Brief alleging that the deletion of 18B.20.040F was also inconsistent with the  
4 Upper Nisqually Valley Community Plan as required by RCW 36.70A.130(1)(d) and thus the  
5 Board made no specific ruling on that issue, which must be deemed abandoned pursuant to  
6 WAC 242.03.590(1).<sup>21</sup>  
7

8 Additionally, the County correctly notes that the Board's remand pertained only to  
9 electronic message boards in rural zones outside Community Plan Areas<sup>22</sup> and that the  
10 Compliance Ordinance prohibits such signage in rural zone classifications.<sup>23</sup> The Board's  
11 remand did not pertain to land within urban zones or community plan areas. The Board  
12 finds that Petitioners may not now argue on compliance that the County must provide  
13 signage restrictions to protect the rural **element**, which Petitioners now argue includes  
14 forest and resource lands within a community plan area.  
15

16 The Board is not persuaded and finds that Petitioners' complaint is outside the scope  
17 of the Board's remand, which pertained only to areas outside community plan areas.

18 **The Board finds** Petitioners have not carried their burden to show that the  
19 Compliance Ordinance does not comply with the GMA as found in the Board's order to bring  
20 signage regulations for the County's non-community plan rural areas into compliance with  
21 the rural character provisions of its Comprehensive Plan as required by the GMA.<sup>24</sup>  
22

23 ***Clustering:***

24 Petitioners' challenge that the reformatted Density and Dimension Tables in the  
25 challenged ordinance were inconsistent with the County's Comprehensive Plan was  
26 dismissed as untimely because the County had made no changes to the regulations except  
27 to expand the Agricultural Resource Lands language countywide to provide direction where  
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31 <sup>20</sup> FDO at 5.

32 <sup>21</sup> "Failure by ... a party to brief an issue shall constitute abandonment of the unbriefed issue."

<sup>22</sup> FDO at 15-16.

<sup>23</sup> PCC 18B.10.070.A.2.

<sup>24</sup> FDO at 15-16.

1 maximum density had previously been allowed without restriction.<sup>25</sup> On compliance,  
2 Petitioners now object to changes made in the Compliance Ordinance to the Density and  
3 Dimension Tables pertaining to Agricultural Resource Lands and Rural Farm Lands.

4 The County characterizes these changes as “technical changes” necessary to  
5 implement the County’s development regulations.<sup>26</sup> Petitioners argue that some of the  
6 changes were not merely technical, will affect clustering, and were not required by the  
7 Board’s remand order.<sup>27</sup> The Board recognizes the logic of Petitioners’ concern. However,  
8 the fact that an action is not required by a remand order does not necessarily mean that it is  
9 prohibited. Assuming that Petitioners are correct in noting that the Compliance Ordinance  
10 makes substantive changes that will affect clustering, Petitioners still must carry their burden  
11 to show that those changes violate the GMA as raised in an issue statement presented in  
12 the PFR. It is not sufficient to state that the changes are “germane to issues under review  
13 by the Board.”<sup>28</sup>

14  
15 First, the legal issues raised by Petitioner pertaining to clustering were dismissed in  
16 the Board’s FDO, and the remand order focused solely on signage regulations in rural  
17 areas. WAC 242-03-930(2) states:

18  
19 A person who ... seeks to raise new issues unrelated to compliance with the  
20 board's prior order, must file a new petition for review. New issues are  
21 issues not within the nature, scope and statutory basis of conclusions of  
22 noncompliance in the board's prior order finding noncompliance.

23 Secondly, the Board finds nothing in the GMA that prohibits a County from adopting  
24 new regulations at the same time as making changes to comply with a remand order. A  
25 remand order does not dictate the manner in which a municipality must bring its legislation  
26 into compliance with GMA.<sup>29</sup>  
27  
28  
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30 <sup>25</sup> FDO at 16-17.

31 <sup>26</sup> Respondent’s SATC at 3.

32 <sup>27</sup> Petitioners’ Reply to Respondent’s SATC at 4.

<sup>28</sup> *Id.*

<sup>29</sup> *North Clover Creek, et al. v. Pierce County*, GMHB Case No. 10-3-0003c, Order Finding Compliance (January 18, 2011) at 5.

**The Board finds** Petitioners have not shown that the County's additional enactments fail to comply with the GMA as to an issue raised in the PFR.

#### IV. ORDER

**The Board finds and concludes** the County's action in restricting electronic message boards in non-community plan rural areas complies with the GMA as set forth in the FDO on Remand.

Based upon the foregoing, the Board ORDERS:

- Pierce County's adoption of Ordinance No. 2014-42 corrects the deficiencies found in Ordinance No. 2013-30s2 and complies with the goals and requirements of the GMA as set forth in the Board's April 28, 2014, Final Decision and Order on Remand. The Board therefore enters a **finding of compliance** for Pierce County re: Ordinance No. 2013-30s2.
- GMHB Case No. 13-3-0010 is **closed**.

Dated this 4th day of August, 2014.

**Cheryl Pflug, Board Member**

Margaret Pageler, Board Member

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Raymond Paolella, Board Member

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>30</sup>**

<sup>30</sup> Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1); WAC 242-03-840.

A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.

It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.